IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 362.

No. 363.

WILLIAM B. BOSLEY, PETER L. WHEELER, and SAMUEL H. BUTEAU, Trustees of "The Samuel Merritt Hospital," and ETHEL E. NELSON,

Appellants,

vs.

JOHN P. McLAUGHLIN, Labor Commissioner of the State of California, JOHN KEAN, Deputy Labor Commissioner of the State of California, and JOHN J. TOBIN, Deputy Labor Commissioner of the State of California; W. H. L. HYNES, District Attorney of Alameda County, State of California,

Appellees.

APPELLANTS' BRIEF.

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In the Supreme Court

OF THE

UNITED STATES.

WILLIAM B. BOSLEY, PETER L. WHEELER and SAMUEL H. BUTEAU, Trustees of "The Samuel Merritt Hospital," and ETHEL E. NELSON,

Appellants,

vs.

JOHN P. McLAUGHLIN, Labor Commissioner of the State of California, JOHN KEAN, Deputy Labor Commissioner of the State of California, and JOHN J. TOBIN, Deputy Labor Commissioner of the State of California, W. H. L. HYNES, District Attorney of Alameda County, State of California,

Appellees.

Numbers 362 and 363 October Term 1914.

SUMMARY OF QUESTIONS PRESENTED ON THESE APPEALS.

These appeals involve the validity of certain provisions of the Statute known as the California Eight

Hour Law for Women. Number 362 is an appeal from an order refusing a preliminary injunction, the application for which was heard on the bill alone. Number 363 is an appeal from the final judgment dismissing the bill.

The Act of 1913.

The act in question as amended in 1913 provides that no woman shall be employed by the same employer more than eight hours a day, or forty-eight hours a week, in any mercantile establishment, factory, *hotel, hospital* or apartment house, and certain other designated places. The Statute also prohibits the employment of women *by* express or transportation companies for a longer period of time than that mentioned.

Two exceptions are, however, provided for by the law, these being:

(1) Women engaged in harvesting, canning, curing or drying perishable fruit or vegetables;

(2) Graduate nurses in hospitals.

The prohibition of the Statute is absolute. No allowance is made for the emergencies of life.

Proceeding in the District Court.

This action was commenced by the Trustees of the Samuel Merritt Hospital and Ethel Nelson, a graduate pharmacist employed in that hospital, to enjoin certain State officers specially charged with the enforcement of the law from taking proceeding against them. The defendants made no motion to dismiss

but filed their answer. On the case being called for hearing, the Court refused to allow evidence to be introduced, and dismissed the bill on its own motion, after expressing the view that the Statute was an exercise of police power, intended for the protection of health, and stating that the Court was not satisfied that the act was so utterly unreasonable and extravagant as to justify a decision declaring it invalid in any part.

Position of Appellants.

The Appellants respectfully contend that the law under consideration is not an exercise of police power, designed for the protection of public health.

(a) The Act is not a health law.

There is no word either in the Statute or in the title giving color to the assumption that the law is a health law, while the body of the act, the classification on which it rests, the exceptions specified, the imposition of penalties upon the employer alone, the fact that the Statute was intentionally framed so that women may work as many hours a day as they please, provided that not more than eight hours of labor be performed for the same employer, and the condition of the laws of civilized nations at the time the statute was enacted, all show that the object of the law was the amelioration of the conditions under which the labor of women is performed, without particular regard to health.

The truth is that though it might be argued that some of the provisions of the act could, standing alone, be regarded as intended for the protection of health, this is by no means true of the act as a whole.

Viewed in its entirety, the statute embodies the idea that "eight hours is a fair day's work."

Indeed, it has been remarked by the Department of Labor "that the shortness of the working day is proportionate to the development of the organization of the working people." [1] And as stated by Rea (Eight Hours for Work):

> "In the matter of hours for labor it is possible to say that the question is not one between benefit and hurt, but merely the preference of one section of the people to one form of benefit and the preference of another section to another form of benefit." [2]

The primary question fairly presented by this appeal is whether the desire of part of the people for an eight hour day may be achieved by a law restricting to that end the liberty of all the people.

Appellants contend that such a law is not a legitimate exercise of legislative power, but if it be held otherwise or if it be determined that the act is to be regarded as a health measure, a question of even greater importance arises.

(b) If the Act be regarded as a health law, it is nevertheless invalid.

Assuming for the purpose of discussion that the Statute is to be viewed as a health measure and that regarded in the light of this purpose it is in a general sense valid, appellants contend that the provisions of the Statute applicable to hospitals are invalid. So far as hospitals are concerned the act limits the liberty of physicians, surgeons, pharma-

Equal protection of the laws is denied to all hospital employees except graduate nurses.

[1] Bulletin No. 118, U. S. Dept. of Labor, Bureau of Labor Statistics.

[2] "Eight Hours for Work," John Rae, Macmillan & Co., p. 320.

cists, *experienced* nurses and all other women working therein except *graduate* nurses.

Equal protection of the laws is denied to all hospital employees except graduate nurses (Continued.)

Appellants offered to prove that as matter of fact there was no reason for this exception. No reason has been shown by actual experience and there is no difference in function, physique, occupation or education between graduate *nurses* and other women working in hospitals on which the distinction may be rested. The fact is that the work of a graduate nurse in a hospital is usually of the same character as that performed by other women therein, and the graduate nurse differs from the other workers only in that she has finished a course of study for the care of the sick, which may be more or less complete than that of other hospital employees. Under existing conditions this course of study is neither prescribed by law nor fixed by custom, and is merely that which any hospital or training school may see fit to prescribe.

Conceding freely the power of the State to classify with reference to the evil to be prevented, and admitting that if the class discriminated against is or reasonably may be considered to define those from whom the evil mainly is to be feared, that class may properly be picked out; admitting that abstract symmetry is immaterial and that classification may be based on experience, still no reason can be suggested from actual experience, or otherwise, which sustains a law prohibiting the graduate physician, the grad-

Equal protection of the laws is denied to all hospital employees except graduate nurses. (Continued.)

uate pharmacist, the experienced nurse, and others from working more than eight hours a day, but according that right to a graduate nurse.

If the object of the law be the preservation of health, the classification is arbitrary and operates as a denial of equal protection of the laws.

A fair view of the object of the Act affords a rational explanation for the exceptions. The Statute under consideration expresses the economic ideas of a class, but as this class was unable to establish the condition for which it contended through the operation of economic force, its members were compelled to resort to political power. It has been said "Law is a condition of politics rather than its end," and the truth of this statement appears in the Statute. The Act prohibits the employment of women more than forty-eight hours a week or eight hours a day in certain specified places. But the condition of politics was such that no law of this kind could be passed against the will of the agricultural interests; accordingly the Court will note the significant fact that women engaged in agricultural labor are not included in the act and that the Statute excepts from its operation women employed in harvesting, canning, curing or drying perishable fruit or vegetables. This was a concession to the agricultural interests. Such is the truth even if there be in fact a distinction upon which the Court must support the classification.

Equal protection of the laws is denied to all hospital employees except graduate nurses. (Continued.)

In 1913 when hospitals were added to the list of places proscribed, an additional exception was inserted in the Act—"graduate nurses in hospitals." Of the various classes of persons usually employed in hospitals, graduate nurses alone are organized. Physicians, pharmacists, experienced nurses and others not possessing this marked advantage were subjected to the law, but the economic advantage arising from being excepted was apparent to graduate nurses, who insisted upon and obtained exemption.[1] But the exception was so limited as to include only "graduate" nurses,—that is, women who have completed in some training school for nurses courses of study in the occupation of nursing the sick, and have become graduates of that school,—experienced nurses, physicians and pharmacists are subject to the law.

So this question arises: Can the Legislature confer on graduate nurses alone the economic advantages arising from the exception and at the same time limit the freedom of contract of experienced nurses, physicians, pharmacists and other women? We submit that this cannot be done.

It may seem that the exception is small, and in a way trivial, but the vital importance of the principle on which it rests is apparent, and it seems that

[1] The fact that certain classes of labor object to being included in laws limiting the hours of labor is not unusual. See Webb "Industrial Democracy," Longmans, Green & Co. Ed., 1902, p. 342, *et seq.*

the pressure of competition is such that organizations will be quick to seize and demand special favors.

Indeed, in cases in which liberty may be limited by law, the importance of requiring the strictest observance of the Constitutional provisions relating to equal protection of the laws is manifest. Very few cases have arisen relating to exceptions to statutes based on a classification and dependent upon that classification for their validity, but one thing is clear, and that is the exception must be framed on some reason other than the political power of the class excepted.

As there cannot be the least doubt that further advances in organization of the working class will result in even more drastic regulation than that existing or proposed, the importance of this question is evident. If, as appellants contend, this act violates the provisions of the Federal Constitution, it is best that this fact be decided at once. To sustain such laws on a false basis merely permits the movement from which they spring to gather an almost irresistible impetus.

The Allegation of the Bill.

Messrs. Bosley, Wheeler and Buteau hold certain property in trust "to found and maintain a hospital "and to treat therein free of all charge as many "poor persons suffering from injury or afflicted with "curable non-contagious disease as the income from "the fund will permit." As Trustees of this trust they had founded and were maintaining The Samuel Merritt Hospital, which contains forty beds for the free treatment of the sick and an equal number of beds for paying patients.

In the conduct and operation of this hospital there are employed eighty women and eighteen men. Among the women so employed is Ethel Nelson, one of the Appellants, her principal occupation being that of hospital pharmacist. Miss Nelson is a graduate of the Department of Pharmacy of the University of California, and licensed to carry on that occupation in California. The exigencies of her occupation are such that on some occasions she is required to work in the hospital more than forty-eight hours in a week, and sometimes more than eight hours in a day.[1] The Trustees of the hospital desire to retain Miss Nelson as a hospital employee, but considerations of economy and efficiency make this impossible if the Trustees become subject to fine

[1] There is a statute in California limiting the hours of labor of pharmacists to ten hours a day and sixty hours a week. This is obviously a proper exercise of the police power and the validity of the act is not in any way questioned. Stat. Cal., 1905, p. 28.

and imprisonment whenever the exigencies of her occupation as pharmacist render it necessary for her to work in a hospital more than forty-eight hours a week, or more than eight hours a day.

The Act.

The complaint sets forth the full text of the act, which is as follows:

"Section 1. No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, public lodging-house, apartment house, hospital, place of amusement, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this State more than eight hours during any one day or more than forty-eight hours in one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of one day, or forty-eight hours during any one week; *provided, however,* that the provisions of this section in relation to hours of employment shall not apply to nor affect the harvesting, curing, canning, or drying of any variety of perishable fruit or vegetable, nor to graduate nurses in hospitals.

Sec. 2. Every employer in any manufacturing, mechanical or mercantile establishment, laundry, hotel, or restaurant, or other establishment, employing any female, shall provide suitable seats for all female employees, and shall permit them to use such seats when they are not engaged in the active duties of their employment.

Sec. 3. The bureau of labor statistics shall enforce the provisions of this act. The commissioner, his deputies and agents, shall have all powers and authority of sheriffs or other peace officers, to make arrests for violations of the provisions of this act, and to serve all processes and notices thereunder throughout the State.

Sec. 4. Any employer who shall permit or require any female to work in any of the places mentioned in section one more than the number of hours provided for in this act during any day of twenty-four hours, or who shall fail, neglect, or refuse to so arrange the work of females in his employ so that they shall not work more than the number of hours provided for in this act during any day of twenty-four hours, or who shall fail, neglect, or refuse

to provide suitable seats as provided in section two of this act, or who shall permit or suffer any overseer, superintendent, foreman, or other agent of any such employer to violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for a first offense, by a fine of not less than twenty-five dollars nor more than fifty dollars; for a second offense, by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars; or by imprisonment for not more than sixty days, or by both such fine and imprisonment. All fines imposed and collected under the provisions of this act shall be paid into the State treasury and credited to the contingent fund of the bureau of labor statistics."

Statutes of California, 1913, p. 713.

The bill then sets forth in some detail the manner in which the Merritt Hospital is conducted, alleging that the value of the rights for the protection of which the action is brought, and the extent of damage which the complainants will each suffer, exceeds the sum of Three Thousand ($3,000.00) Dollars. While such a showing is, we believe, proper in support of the allegation of damage, complainants do not contend that the validity of the Statute is to be measured by facts peculiar to the Merritt Hospital. The bill, however, alleges that there is no just or reasonable ground for excepting graduate nurses from the operation of the Statute; that hospitals are not unhealthful or unsanitary places, but on the contrary the health of people working in hospitals is better safeguarded than that of people working in other places, and that a properly conducted hospital for the treatment of injuries and non-contagious dis-

ease is one of the most sanitary places in which labor is performed.

The Answer.

The defendants' answer traversed the allegations of the bill as to the extent of damage suffered by the plaintiffs, and the allegations that the Act of June 12, 1913, violated the provisions of the Fourteenth Amendment in the particulars alleged.

No motion to dismiss was made by the defendants. The cause was set down for hearing, and the judgment and minutes of the Court show in concise form the subsequent proceedings.

Order Dismissing Bill in Equity of Petitioners and Plaintiffs, and Rejecting Offer of Testimony by Plaintiffs.

Offer of Proof.

"This cause having come on regularly for trial this 5th day of January, 1914, petitioners appearing therein by their attorneys, and defendants also appearing by their attorneys. Petitioners offered to prove that 'all the allegations of fact set forth in the bill were true; that the fact that a woman was a graduate nurse merely showed that she had completed a course of study for the treatment of the sick; but that the course of study which a woman must take for that purpose was not prescribed by law or fixed by custom, but was such as any hospital or training school might, in the discretion of its governing officers see fit to prescribe; that the difference between a graduate nurse and an experienced nurse is a difference of technical education only, and that there is no standard by which this difference can be measured; that graduate nurses working in, and employed by, hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers or assistants to the medical staff.

The Court thereupon stated that at the prior hearing on the motion for an interlocutory injunction in this case, the Court had held that the complaint did not state a cause of action, and that the Court considered it unnecessary to devote time to the hearing of evidence.

Thereupon it was ordered that the offer of petitioners to introduce evidence in support of the allegations of the bill be, and the same is, denied. It was further ordered that the bill of complaint be dismissed, and a decree be signed, filed and entered accordingly, to which said orders petitioners were allowed exceptions" (Tr., fol. 31, No. 905 or 363).

Thereafter the following judgment was made and entered: Judgment.

"This cause having come on regularly for trial this 5th day of January, 1914, and the Court having denied to petitioners the right to introduce evidence offered in support of the bill, and having ordered that the case be dismissed;

"Now, therefore, it is ordered, adjudged and decreed that the petitioners take nothing by their action, and that the bill of complaint be and is hereby dismissed with costs to defendants.

"William C. Van Fleet, Judge."

(Tr., fol. 33, No. 905 or 363.)

SPECIFICATION OF ERRORS.

Appeal Number 363.

The Court erred in dismissing the bill in equity.

The judgment dismissing the bill in equity, seeking to enjoin the enforcement of the Act of the Legislature of the State of California, approved June 12, 1913, and fully set forth in said bill, is erroneous for each of the following reasons:

(1) The said act of the Legislature if put into execution will deprive the appellants of liberty guaranteed to them by the 14th amendment to the Constitution of the United States.

(2) The said act of the Legislature if enforced will deny to the appellants, and to each of them, the equal protection of the laws guaranteed by the 14th amendment to the Constitution of the United States, and

(3) The provisions of the Statute excepting graduate nurses in hospitals from the operation of the law and at the same time restricting the hours of labor of all other women working in hospitals, operates to deny to all women working in hospitals other than graduate nurses equal protection of the laws. There is no basis in fact or theory on which this exception may be supported.

The Court erred in rejecting the offer of the appellants to prove that all the allegations of fact set

forth in the bill were true; that the fact that a woman was a graduate nurse merely showed that she had completed a course of study for the treatment of the sick, but that the course of study which a woman must take for that purpose was not prescribed by law or fixed by custom, but was such as any hospital or training school might, in the discretion of its governing officers, see fit to prescribe; that the difference between a graduate nurse and an experienced nurse is a difference of technical education only, and there is no standard by which this difference can be measured; that graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers or assistants to the medical staff.

Appeal Number 362.

The Court erred in denying the application of the appellants for an interlocutory injunction, as prayed for in the bill.

The order denying the application for said interlocutory injunction, enjoining the enforcement of the Act of the Legislature of the State of California, approved June 12th, 1913, and fully set forth in the bill is erroneous because:

(a) The said act deprived the appellants of liberty guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

(b) The said act denies to the appellants and to each of them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The lower Court obviously entertained the view that all facts involved in determining the question of the constitutionality of a law, lie within the realm of judicial notice. If this view be incorrect the decision of the lower Court refusing to allow proof of the allegations of the bill was erroneous. Proceeding, however, on the assumption on which the lower Court acted, this Court will doubtless take judicial notice of the fact that most hospitals are not unhealthy places. On the contrary, hospitals are usually maintained in a highly sanitary condition and the great majority of hospitals do not treat persons suffering from contagious disease.

Hospitals are not unhealthy places.

A properly conducted hospital for the treatment of injuries and non-contagious disease is as healthful and sanitary a place as any in which labor is customarily performed, and the health of people working in hospitals is usually better safeguarded than that of people working elsewhere. The legislation here in question cannot, therefore, be supported on the theory that the place in which the work is done is peculiarly injurious to health; the conditions surrounding the performance of work in hospitals are not similar to those existing in mines and smelters. Indeed, it was not contended in the lower court that the legislation in question was justified by the conditions existing in the places in which the work was

carried on, but by the character of work customarily performed in the places described.

Occupations carried on in hospitals are not injurious to health.

The character of work done by women in hospitals is a matter of common knowledge. The large modern hospital is usually divided into departments, and the method of administration adopted in the Samuel Merritt Hospital, and set forth in the bill, is typical. In these hospitals, a certain number of women work in the office or administrative department, their occupations being those of bookkeepers, stenographers, etc. Their work may be described as office work, and does not differ from work of the same character done in other places. The housekeeping department, which is usually directed by a housekeeper or matron, includes the domestic servants, cooks, etc. In this department there is nothing peculiar about the work arising from the fact that it is performed in a hospital.

Administrative department.

The care of the sick.

The work of caring for the sick is performed by the medical staff and, under their supervision and direction, by women who are generally described as nurses. The medical staff of a hospital frequently includes women among its members, and much of the scientific work done in hospitals, such as the preparation of drugs, the administration of anesthetics, and the making of chemical and pathological analyses, is done by women. Women engaged in the practice of medicine seek and obtain employment

by hospitals, and such employment is practically essential to their professional success.

The work of nursing. The work of nursing has always been considered as lying peculiarly within the province of women, and though their entry into the field of scientific work is a matter of modern development, the work of nursing has been performed by them for many centuries.

History of Nursing. In former times hospitals were usually conducted by religious societies, and the work of nursing done by women who had taken Holy Orders. This custom still exists, and every large city in the world contains one or more hospitals so conducted. The women who perform the work of nursing in these hospitals are not graduate nurses: they are usually members of the order by which the hospital is maintained.

About the time of the Crimean War, Florence Nightingale advocated founding schools for the training or instruction of women engaged in nursing. The first training school organized in this country was at New Haven. The Bellevue Hospital of New York was the first to begin the actual work. These examples were followed somewhat slowly by the medical profession, but the idea was quite generally adopted in the closing decade of the last century. Indeed, the advances in the art of surgery were such as to require that the people in whose charge the patient remained after the operation was

performed, be instructed in some rudimentary principles of surgical art. At the present time there are three kinds of nurses: the experienced nurse, the graduate nurse, and the student nurse. Probably the greatest number of women engaged in the occupation of nursing the sick are experienced nurses, that is, women who have chosen that occupation as a vocation in life, but have not completed a course of study at any school in which the art of nursing is taught. In hospitals caring especially for people suffering from insanity or nervous diseases, graduate nurses are rarely, if ever, employed to nurse the sick. In such hospitals, and throughout the country in general, the major part of the work of caring for the sick is done by experienced nurses.

Experienced nurses.

Many of the large hospitals which are not controlled by religious societies conduct schools for the training of nurses. In these schools women receive some rudimentary medical education intended to fit them to care for the sick. Such education is designed primarily to fit the student to meet the emergencies that arise in nursing the sick during the absence of the attending physician or surgeon, and to carry out the instructions of the physician or surgeon in charge of the patient. The primary factor in the education of a nurse is experience, which can best be acquired in a hospital. The work of the students which is essential to the education and training of nurses is, however, of value to the hospital in which

Student nurses.

System of training now in use.

they study, and the fact that in hospitals some members of the medical staff and several trained nurses are always within call, gives the work of the student nurse in that place a value it would not otherwise possess. The result is that where training schools are conducted by hospitals, most of the work of nursing is done by the students therein. As the hospital benefits from the work of the students, it is customary for it to train these women free of charge, and to furnish them with board, lodging and laundry. In some hospitals, such as the Samuel Merritt Hospital, a small monthly salary, varying from Ten Dollars to Twelve Dollars and Fifty Cents, is paid in addition. The custom of paying compensation is not universal.

The health of student nurses.

The life led by student nurses in a well conducted hospital is not less healthful than the life led by other women. Prescribed rules usually compel them to observe a general routine in their mode and habit of living, and ample rest, and usually regular hours of arising and retiring are among the rules which are enforced as strictly as the exigencies of the occupation permit. In well conducted hospitals the health of student nurses is constantly preserved under the routine there established, and in such hospitals the health of these women generally improves after they have entered the institution. The percentage of illness among hospital employees is less than that ordinarily incident to almost any other employ-

ment, and is considerably less than that of women who are not engaged in working for a livelihood. The work of nursing, however, is such that the hours of labor in any one day cannot be definitely measured or limited, for the condition of the patient on whom the nurse attends may be influenced by a change of attendants if this change takes place at a critical period of illness. The fact is that the service of nursing is such that the hours of labor must be more or less determined by the condition of the patient. The efficient protection of public health requires that such latitude be allowed in the matter of hours of labor of women engaged in this work as may be compatible with the preservation of the health of the women themselves.

Advantages of existing system.

There is a marked economic advantage incident to the employment of student nurses in hospitals. The work of the student essential to education is performed under conditions which render it of value to the hospital, and for the service essential to education the student receives the desired education as partial compensation. This enables the hospital to extend the benefits arising from the education, and also the field of charitable work, beyond limits otherwise attainable.

The fact that women working for gain are at a disadvantage in competing with women performing similar labor for the benefit of the education and experience which they derive from it is obvious,

and this disadvantage is increased when the environment in which the work is performed tends to minimize the advantage of the more highly trained worker. The natural result of these conditions is that in hospitals the principal part of the work of nursing is done by the student nurse; the graduate nurse is usually employed in the operating room in the capacity of an assistant to the surgical staff. In the hospital wards the graduate nurse acts as a superintendent or director of the work of the nurses. But most hospitals conduct departments for the treatment of the rich as well as the poor, and as the wealthier classes frequently demand the services of a graduate nurse, the hospitals do employ graduate nurses to care for members of the wealthier class willing to pay the increased charge incident to such service, a charge varying from twenty-five dollars to thirty-five dollars a week for nursing alone. In other words the work customarily done by graduate nurses in hospitals is not peculiar to them. Work of the same kind is done by other women.

Graduate Nurses.

ARGUMENT.

The provisions of the Statute excepting "graduate nurses in hospitals" from the restrictions imposed give rise to a question peculiar to this appeal, which was neither presented to nor passed upon by the Supreme Court of California in the Miller case.

If the opinion of that Court in the Miller case be adopted, it by no means follows that the provisions of the Statute of 1913 dealing with hospitals are valid. As this question is peculiar to the case at bar, we have divided the Argument into two parts, the first of which deals with the question peculiar to this appeal; the second deals with questions common to both this case and the Miller case.

PART I.

THE PROVISION OF THE STATUTE EXCEPTING GRADUATE NURSES FROM THE OPERATION OF THE LAW RESULTS IN DENYING EQUAL PROTECTION OF THE LAWS TO ALL OTHER WOMEN WORKING IN HOSPITALS.

Before taking up the question of fact on which the determination of this branch of the case depends, we have endeavored to set forth the rules of law governing the question in the language in which they have been declared by the decisions of this Court.

Statutes passed in exercise of Police Power must not operate to deny equal protection of the Laws.

It is of course well settled that the mere fact that a statute is enacted on exercise of the police power does not relieve it from objection on the ground that it operates to deny equal protection of the laws.

Connolly v. Pipe Co.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558, this Court said:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the

Connolly v. Pipe Co. (continued).

declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How., 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 626."

In that case the Court declared the rules of law governing questions of this class, saying:

Equal Protection of the laws requires that no impediments be interposed to the pursuits of one except as applied to the same pursuits by others.

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition*, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses" (p. 559).

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never

Connolly v. Pipe Co. (continued)

be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S., 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws" (pp. 560, 561).

The mere fact of classification is not sufficient to relieve a statute from the requirement of the equality clause.

"A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. *In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity.* It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of

the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates" (pp. 562, 563).

Mr. Justice McKenna did not concur in the decision of the case, but the view which he expressed concerning the principles of law governing the matter did not differ in principle from those set forth in the main opinion. He said:

Connolly v. Pipe Co. Opinion of Mr. Justice McKenna.

"The equality of operation which the Constitution requires in State legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions, and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. *'A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation'*" (p. 570).

Cotting v. Kansas.

In *Cotting* v. *Kansas,* 183 U. S., 79, 112, this Court said:

"Equal protection of the law is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

Low v. Printing Co.

The applicability to labor laws of the rule laid down in the Connolly case is pointed out in *Low* v. *Rees Printing Co.,* 59 N. W., 362, wherein it was held that a law limiting the hours of employment of all classes of persons, except those engaged in farm or domestic labor, was invalid, because it

operated to deny the equal protection of the laws guaranteed by the Constitution.

In *Smith* v. *Texas,* 233 U. S., 630, the Court said: Smith v. Texas.

> "Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling" (p. 636).
>
> "So the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it—and the answer in no way denies the right of the State to require examinations to test the fitness and capacity of brakemen, firemen, engineers and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.
>
> "If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States" (p. 641).

In *Smith* v. *Texas* the Court did not treat the questions of fact upon which the decision rested as lying within the realm of judicial knowledge but

took evidence to determine the questions of fact on which the constitutionality of the law depended.

If the procedure apparently sanctioned by this decision be correct the judgment in the case at bar must be reversed.

But apart from this if the rules of law declared by this Court be followed, the Statute under consideration cannot be sustained, for there is no basis in fact or theory on which the exception to graduate nurses can be justified.

Appellants offer to prove as matter of fact that equal protection is denied.

The act does not limit the work of all women in hospitals as it does in the case of hotels and apartment houses, but it expressly declares that "graduate nurses in hospitals" are excepted from the operation of the act. Appellants alleged that this exception operated to deny to them the equal protection of the laws and offered to prove that "all the allegations of "fact set forth in the bill were true; that the fact "that a woman was a graduate nurse merely showed "that she had completed a course of study for the "treatment of the sick, but that the course of study "which a woman must take for that purpose was "not prescribed by law or fixed by custom, but was "such as any hospital or training school might, in "the discretion of its governing officers see fit to pre-"scribe; that the difference between a graduate "nurse and an experienced nurse is a difference of "technical education only, and that there is no "standard by which this difference can be meas-

"ured; that graduate nurses working in and em-
"ployed by hospitals do not ordinarily perform
"therein the work of nursing the sick, but act as
"overseers to assistants to the medical staff" (Tr., fol. 31).

The Court, however, refused to hear any evidence on this subject. The following question is therefore presented: Are there any facts or conditions within the realm of judicial knowledge justifying the exception of graduate nurses from a law forbidding all other women the right to work more than eight hours a day in hospitals? If no such are at present known, then the Statute discriminates against all other women by granting to graduate nurses liberty and denying equal freedom to others.

There is no basis in fact or theory for the classification adopted.

Consultation with and inquiry addressed to those most familiar with the conduct of hospitals has disclosed no reason on which this classification can be rested, nor does common sense or past experience afford any ground therefor.

A graduate nurse is a woman who has completed a course of study for the treatment of the sick. But the course of study pursued is neither prescribed by law nor fixed by custom and is merely such as the hospital or training school giving the same may see fit to prescribe. The length of time required as a prerequisite to graduation varies from one to three years. Indeed, correspondence schools for training of nurses are now carried on, and it seems that the

There is no basis in fact or theory for the classification adopted. (Continued.)

graduate of any school for the training of nurses is a *graduate nurse.*

The sole difference between a graduate nurse and any other woman is a difference of education and of the extent of that difference there is no measure. Other women habitually working in hospitals and performing work of the same character as that done by graduate nurses are more highly educated than the graduate nurse.

This vague educational qualification certainly can not be made the basis for the exception of graduate nurses, for the law applies to graduate physicians, graduate surgeons and women of high scientific training, such as Ethel Nelson. Women whose education includes all that that of a graduate nurse includes and much more are not excepted from the act. Even if education could be adopted as a basis of classification in or exemption from laws limiting the hours of labor, it is clear that no fair educational qualification has been adopted.

Smith v. *Texas,* 233 U. S., 630.

But it is respectfully submitted that an educational qualification cannot of itself be made the basis of exemption from the operation of laws limiting the hours of labor.

Gulf v. Ellis.

As said by this Court in *Gulf, Colorado & Santa Fe R. R.* v. *Ellis,* 165 U. S., 150, 155:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties

Gulf v. Ellis. (Continued.)

successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

"Classification for legislative purposes must have some reasonable basis upon which to stand. *It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.* Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land" (p. 155).

Education does not of itself afford a basis of classification, nor does the mere fact of occupation in itself afford a ground of classification.

Ex parte Jentzsch.

In *Ex Parte Jentzsch,* 112 Cal., 468, 474, the Supreme Court of California declared void a law prohibiting barbers from working on Sunday after the hour of noon, for the reason that the prohibition did not apply to any other class of persons. The Court said:

"In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason

Ex parte Jentzsch. (Continued).

why it is made to operate only upon a class, and not generally upon all. As was said in *Pasadena* v. *Stimson*, 91 Cal., 238: 'The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercse of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' And in *Darcy* v. *Mayor, etc., of San Jose*, 104 Cal., 642: 'The classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation.'"

"In a law such as this, no reason has been or can be shown why the followers of one useful and unobjectionable employment should be debarred from the right to labor upon certain days, and others in like classes of employment be not so debarred. If it be constitutional to single out one such class and deny its members the right to labor on one day in the week, it would be constitutional to prohibit them from following their vocation upon six days of the week. When any one such class is singled out and put under the criminal ban of a law such as this, the law not only is special, unjust, and unreasonable in its operation, but it works an invasion of individual liberty, the liberty of free labor which it pretends to protect" (p. 475).

We admit that if the occupation be in itself dangerous or unhealthy, or if the incidents surrounding the work are unusual, these facts may afford a basis for classification, but such is not true in the case under consideration.

rbitrary haracter the ex- ption.

There is not any difference between the functions ordinarily performed by graduate nurses in hospitals and those performed by other women on which this classification may be placed. The Statute itself

Arbitrary character of the exception. (Continued.)

does not limit the scope of the exception to graduate nurses while engaged in the work of nursing or the performance of any particular function, and as the act is a criminal statute it does not seem possible to limit by construction the scope of the express exception. In other words, if Miss Nelson were a graduate nurse, she could pursue the calling in which she is now engaged and work as many hours as she desired. A graduate nurse is excepted from the operation of the Statute and, as the Legislature has not limited the exception to graduate nurses while engaged in performing the functions ordinarily performed by them, the Court cannot limit the exception and thus by construction make criminal an act which the language of the Statute declares not criminal. *U. S.* v. *Ragsdale,* Hempst., 479. In the case of a criminal statute the offense charged must come within the *letter* of the law. *Atty. Gen.* v. *Sillem,* 33 L. J. Ex., 92, 110; *Dyke* v. *Elliot,* L. R. 4, P. C., 184, 191; *U. S.* v. *Wiltberger,* 5 Wheaton, 96. But assuming that this is not true and that graduate nurses are excepted from the operation of the Statute only while engaged in performing duties customarily performed by them, still in fact there is no basis for the exception. As already stated, the work of a graduate nurse is either that of assistant to the surgeon or that of supervisor of wards, or that of nursing. Work of the same general character is customarily performed by other

Arbitrary character of the exception. (Continued.)

women. Why should the assistant to the surgeon if a graduate nurse be excepted from the law, but the surgeon or any other assistant subjected thereto? Why should the graduate nurse be excepted from the law but the experienced nurse subjected to it? The work that they perform is the same. Take also the case of the pupil nurse,—the work she performs is the same as that performed by some graduate nurses. She, it is true, works for her own education rather than for pecuniary compensation, but does this afford a ground for restricting her liberty? True, she may not be in the position of economic independence of the graduate nurse, but does this afford a reason for placing further burdens and restrictions upon her?

We respectfully submit that no reason can be found either in past experience or in legal theory which justifies this exception.

PART II.

THE STATUTE UNDER CONSIDERATION WILL, IF ENFORCED, OPERATE TO DEPRIVE THE APPELLANTS OF LIBERTY WITHOUT DUE PROCESS OF LAW.

SUMMARY OF APPELLANTS' POSITION.

The principles of law governing the disposition of this branch of the case are well settled.

We concede at the outset that if the Statute under consideration be a health law and the restrictions imposed are not arbitrary or unnecessarily oppressive, the act is valid.

We contend however:

(a) The statute was designed to promote the social or economic welfare of certain classes of the people; it was not enacted for the protection of health.

(b) The statute operates to deprive those on whom it operates of that liberty which the Fourteenth Amendment was designed to protect.

(c) The statute deprives those on whom it operates of liberty without due process of law.

It will doubtless be claimed that a statute designed to promote economic welfare is just as much an exercise of police power as a statute designed to promote public health, and that due process of law requires no more in one case than in the other. This

position is, we believe, based on a misunderstanding of the term police power. We submit that in cases in which it is asserted that a person is deprived of liberty in violation of the Constitution, two questions are presented:

(1) Does the act complained of in truth operate to deprive the individual of liberty? This is a judicial question involving the interpretation of the term "deprived of liberty." If this question be answered in the affirmative there is then presented the question:

(2) Has the deprivation of liberty complained of been effected without due process of law? This is also a judicial question.

Police power or general governmental power as an element in the interpretation of the 14th Amendment.

In determining what constitutes a deprivation of liberty within the meaning of the Fourteenth Amendment, it is of course necessary to construe that Amendment in the light of the Constitution as a whole, for it was not intended by that enactment to destroy or unnecessarily limit the reserve power of government, a power frequently termed police power. Accordingly, when it is claimed that a deprivation of liberty has resulted from a statute which repudiates in its entirety certain common law theories formerly accepted by our people and in execution of its purpose limits freedom of contract in certain particulars, this Court has pointed out that such is not the necessary effect of the statute; that

the Fourteenth Amendment must be interpreted in the light of the power to legislate for the public welfare or police power; that liberty of contract is not itself protected by the Fourteenth Amendment except insofar as it is an essential element or attribute of liberty itself; and that laws enacted for the public welfare do not operate as a deprivation of liberty merely because they regulate or restrict to a certain extent liberty of contract, one of the incidents of liberty. The decisions of this Court in *Erie R. R. Co.* v. *Williams,* 233 U. S., 685, upholding a law fixing the time of payment of wages; in *Chicago, B. & Q.* v. *McGuire,* 219 U. S., 549, involving the Employers' Liability Act, and the recent decision in *German Alliance Ins. Co.* v. *Kansas,* 233 U. S., 389, involving the power of the State to regulate charges of insurance companies illustrate this phase of the question. But this Court has never gone so far as to hold a law enacted in furtherance of the public welfare may deprive a citizen of liberty or property without due process of law. For instance, a law directing the arrest of a person would unquestionably constitute a deprivation of liberty even though the law was enacted in furtherance of public welfare, and such an act could not be effectuated unless due process of law were afforded to the individual. Similarly a law providing for the taking of all property owned by a single individual in excess of $10,000,000 would constitute a taking

of property without due process of law, though it might be admitted that the limitation of fortunes to that extent was in furtherance of public welfare, the question in all these cases in which public welfare is the test being whether or not the exercise of the general power of government went so far as to constitute a deprivation of property or liberty. *Erie R. R. Co.* v. *Williams*, 233 U. S., 685, 699.

But once it is conceded that the act if enforced will deprive a man of property or liberty, then the only question is whether the individual affected has been afforded due process of law. As said by this Court in *Eubank* v. *Richmond*, 226 U. S., 137, 142,

Eubank v. Richmond.

> police power "is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S., 561. And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' *District of Columbia* v. *Brooke*, 214 U. S., 138, 149. *But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution.*"

Police power as an element of due process of law.

When the case is such that there can be no doubt that the individual has been deprived of liberty or property the question of whether or not due process of law has been accorded is not determined by the conclusion that the statute was enacted in furtherance of public welfare. The question of what is or what is not in furtherance of public welfare is primarily a legislative question. What constitutes due

process of law is a judicial question. If the object of the legislation be the protection of health then due process of law may require no more than legislative action. For instance, a man suffering from smallpox may be isolated and confined pursuant to legislative mandate. The owner of infected food may have that property confiscated in the same manner without being deprived of any constitutional right. This is because due process of law requires no more than legislative action when the object of the legislation is the protection of public health and the extent to which the individual is deprived of liberty or property is not other than such as is reasonably necessary to effectuate that object.

Where, however, the object of the legislation is to destroy rights protected by the Constitution in order to establish conditions deemed in furtherance of public welfare, due process of law generally requires the amendment of the Constitution itself. If the legislative department reached the conclusion that the economic theory of socialism was sound and that public welfare required its adoption this Court could not decide otherwise. But when, in order to establish this theory, a statute is passed abrogating the right of property, this Court could and would decide that due process of law required the amendment of the Constitution.

Dual meaning of police power.

The term police power has, unfortunately, been used to describe not only the reserved power of gov-

ernment, a power with regard to which the phrase "deprived of liberty or property" must be interpreted, but also that small and limited class of objects to the attainment of which legislative action does of itself constitute due process of law though rights protected by the Constitution are invaded.

THE STATUTE IS NOT A HEALTH LAW.

The question of the purpose of a statute is a judicial question and must be determined in accordance with the settled rules of law.

In *Minnesota* v. *Barber*, 136 U. S., 313, 319, this was pointed out, the Court saying:

Rules of law pursuant to which the purpose of the statute must be determined.

> "In *Mugler* v. *Kansas*, 123 U. S., 623, 661, the court, . . . said that the judiciary must obey the Constitution rather than the law making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

Soon Hing v. Crowley

In *Soon Hing* v. *Crowley*, 113 U. S., 703, the Court laid down the rule by which the purpose of a legislative act must be ascertained, as follows:

> "The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments."

The language of the Court in *Minnesota* v. *Barber*, 136 U. S., 313, and *Mugler* v. *Kansas*, 123 U. S., 623, set forth above, was also referred to with approval in the opinion of Mr. Justice Harlan in *Lochner* v. *New York, supra*, and in the opinion of the Court in that case the established rules were announced and followed without question, Mr. Justice Peckham saying:

Lochner v. N. Y.

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. *The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.* *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78. The Court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U. S., 356.
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> "It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be

prohibited or interfered with, without violating the Federal Constitution."

Lochner v. *New York*, 198 U. S., 64.

Though as stated the question of the purpose of the law is primarily judicial, the question of whether the restriction imposed by the law is reasonable or unreasonable in the light of an assumed object is a question of fact, and the determination of the purpose of the law may rest on the conclusion reached on this question of fact. As it is well settled that courts will not declare a law unconstitutional in doubtful cases the result is that where the question of the constitutionality of a law is dependent on a question of fact, the conclusion of fact on which such a decision rests must be clear and free from reasonable doubt, or the law cannot be declared invalid. For as said by Mr. Justice Harlan in *Lochner* v. *New York, supra:*

Lochner v. N. Y. Opinion of Mr. Justice Harlan.

"If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the Court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional."

Lochner v. *New York*, 198 U. S., 68.

Muller v. Oregon.

The difficulty with cases of this class arises from divergent views on these questions of fact. In *Muller* v. *Oregon,* 208 U. S., 412, Mr. Justice Brewer pointed this out, saying:

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Muller v. *Oregon, supra,* 420, 421.

If the purpose of the act under consideration be ascertained in accordance with the accepted rules of this Court, the assumption that the act is a health law,—an assumption indulged by the Supreme Court of California and by the District Court,—cannot be justified.

Analysis of California Statute.

Section 1 of the act provides that no female shall be employed in certain designated places or by certain designated companies more than eight hours in any one day.

The list of designated places may be divided into groups; they are: The classification adopted.

Mercantile Establishments,	Manufacturing Establishments,
Hospitals,	Mechanical Establishments,
Apartment Houses,	Telephone or Telegraph Establishments,
Hotels,	Restaurants.
Public Lodging Houses,	
Places of Amusement,	
Laundries,	

The companies prohibited from employing women for more than eight hours a day in any place are:

(1) Transportation Companies.

(2) Express Companies.

Agriculture and Domestic Science.

Speaking broadly the Statute, regardless of express exceptions, covers the entire field within which women are employed, saving that of agriculture and domestic service.

Bases for the claim that Statute is a health law.

The term "Mercantile Establishment" is probably used in the wide sense including all business conducted for profit, but if the narrow construction be adopted, the wide sweep of the act is not materially restricted; yet there is not a single place specified in the Statute, with the possible exception of Laundries, which is of itself an unhealthy place in which to work. It has been recognized in recent times that the conditions of labor in connection with machinery subject the worker to an abnormal strain, so if this act covered only mechanical and manu-

Bases for the claim that Statute is a health law. (Continued).

facturing establishments it might be argued that it was intended to protect the nervous systems of the workers against the strain of working in connection with machinery, or where machinery sets the pace.

But in the last few years the courts of some of the States, struggling to uphold legislation, have reached the conclusion that *possibly* labor which involves coming in contact with, and responding to, the demands of the general public, carries with it a strain similar to that of keeping time with machinery. This hypothesis is probably true in some cases but clearly untenable in others. So far as we are aware it is of judicial origin and lacks the confirmation of medical statistics. The Supreme Court of Illinois recently expressed itself on this subject as follows:

People v. Elerding.

> "It is insisted the classification of hotels as a place where employment of females is limited to ten hours is arbitrary, and that the statute discriminates between labor in hotels and other like places, such as boarding houses. The classification is not necessarily based on place of the kind of labor performed, but rather on the character of the business requiring the work, together with the environment and surrounding circumstances under which the work is done. The physical exertion required for the performance of a given amount of work, if measured by muscular effort, may be as great in one place as another. If there be a difference upon which this classification is justified, it must exist because of the surroundings which tend to govern the manner or method of doing the work, such as the movements of associate workmen or of machinery, the necessity of continuous speed to meet the demands of others, and the sanitary conditions and moral atmosphere of the place of occupation. So far as the sanitary conditions and moral atmosphere of the place

where the work is done are concerned, the police power of the State may be invoked to remedy any evils which may exist, but that may be accomplished by appropriate legislation directed to that end without limiting the hours of exposure to such conditions. The mere fact that some hotels, or all hotels, if such were the fact, are improperly ventilated and foul air is breathed by the employes, or, owing to contact with the traveling public, disease may be contracted more readily than in other places, is not a sufficient justification for limiting the hours in which women may be employed in those places. The Legislature has ample power, by direct legislation, to remedy such conditions if they exist. By this enactment it is not sought to change the conditions under which the labor is performed or the character of the labor, but merely to limit the hours of its duration. There is a marked distinction between hotels and boarding houses. A hotel is a quasi public place, and it is within the province of the police power to regulate occupations or business enterprises of a quasi public nature, such as, if unrestricted in their exercise, may be injurious to the health, safety, or general welfare, even though the business is perfectly lawful. This power is so important and comprehensive that its application must be allowed to expand from time to time, to meet new conditions and promote the public welfare. The proprietor of a hotel is engaged in a public business. The demands made upon the employes come from the public and are not altogether dependent upon or controlled by the employer. The unceasing change of guests requires constant attention and continuous effort to supply their wants and satisfy their needs. The speed with which the employes act, and to a large extent the manner of performing their work, are controlled by the public. The pressure of work comes from sources independent of the employer. No method of regulating the demands of the public under such conditions is practicable, but the time such demands may be made upon the employes may be limited. We are of opinion the nature of the business is such as to afford a valid basis for classifying work in hotels as an occupation authorizing its inclusion in the law limiting the hours of labor for females. The pressure and tension under which the labor is performed afford as reasonable a basis for classifi-

cation as the work done in lines of employment where machinery is used."

People v. *Elerding*, 254 Ill., 579, 98 N. W., 985.

Obviously this is as far as, if not further than, any self-respecting tribunal can go. Indeed, as matter of fact, the decision is clearly unjust as the Court assumes that hotels are fairly represented as a class by a relatively small number of large hotels situate in great cities, the patronage of which is primarily transient, the great majority of hotels situate in small towns and cities being utterly ignored. But passing this rather obviously unfair method of ascertaining the characteristics of the class, can it be fairly said that work in mercantile establishment, or apartment house, or hospital is done in a place which is *per se* unhealthy, or under conditions which subject the worker to injurious strain? We submit it cannot, unless the great department stores are considered as typifying all mercantile establishments and similar selections are made to represent hospitals and apartment houses.

Mercantile establishments, hospitals and apartment houses.

The inclusion of mercantile establishments, hospitals and apartment houses in the classification removes the ground on which the argument or hypothesis that the act is a health law may be rested, at least as far as the restrictions applicable to these places are concerned. So far as we are aware it never has been, and cannot reasonably be, said

that more than eight hours' work a day is injurious to health when there are no special circumstances accompanying the work or surrounding the worker other than the fact that the work is done in a mercantile establishment, a hospital or an apartment house. Neither actual experience nor scientific investigation affords any basis for such a claim. It seems clear, therefore, that these provisions of the statute are not enacted with the view of protecting public health.

Consideration of other provisions of the Statute leads to the same conclusion.

Effect of imposition of penalties on employer alone

The Statute imposes no penalty on the employee; the employer alone is punished, consequently the only effect of the Statute is to prevent a woman working any more than the prescribed period for a particular employer. If she desires she may work sixteen or eighteen hours a day if no more than eight hours work be done for the same employer.

This result was readily perceived, and the keepers of hotels and restaurants, and women working therein, were quick to avail themselves of it. Accordingly, the custom arose among women working in these places of contracting with different employers for work during different periods of the day, each period being less than the prescribed eight hours but the sum of both periods exceeding that length of time.

Prior to 1913 this custom had become fairly well

established and though it might at first blush seem that the result was accidental, at least so far as the Act of 1911 is concerned, the history of the Act of 1913 shows that such an explanation of the present Statute is not possible.

History of the Amendment of 1913.

As already stated this custom of contracting was in vogue prior to 1913. When the Act of 1913 was introduced in the Assembly it contained a section prohibiting contracts of this class.

Section 2 of Senate Bill No. 466, introduced January 20th, 1913, then provided:

> "Sec. 2. Where a female is employed in the same day or week by more than one concern or employer in any establishment or occupation named in section one of this act, the total time of employment must not exceed that allowed per day or week in a single establishment or occupation. It shall be the duty of the employer to make diligent inquiry as to such previous or other employment of such female employees elsewhere and as to the hours of such employment. Any person who shall require or permit a female to work in violation of the provisions of this section shall be liable for a violation thereof, and the employment of such female in excess of the total time of employment permitted by law shall be presumed in the absence of evidence to the contrary to be with knowledge of such violation."

This bill was amended in committee and this paragraph omitted therefrom. As so amended it passed both houses and received the approval of the Governor, the same being Chapter 352 of the Chartered Laws of California. As a result there is no escape from the fact that the law under consideration is and was intended to be a law limiting the

The law limits hours of labor for a single employer only.

time for which women may work for a particular employer. It is a law limiting the hours of employment rather than the hours of labor. This fact points clearly to the conclusion that the object of the law is the readjustment of economic conditions, not the preservation of health.

The law limits hours of labor for a single employer only. (Continued).

The provisions of the Statute dealing with transportation and express companies emphasize the economic character of the law. So far as these corporations are concerned, the Statute is frankly a law limiting the labor return which the employer can receive from its employee. It cannot be pretended that the general business of these companies imposes an unusual strain upon the departments in which women are customarily employed, but even if it could, there is no conceivable reason on the score of health why the employees of an express company should be put in a different category from that in which the employees of individuals conducting an express business are included.

We have already stated that as matter of fact there is no general opinion current in the country, or in the world, justifying the view that, irrespective of special conditions, work for more than eight hours a day or forty-eight hours a week is injurious to women.

Eight hour day not necessary for protection of health.

The Statute under consideration was enacted in 1911 and it is but proper to view it in the light of the legislation of the world in force at that time.

A summary of the laws governing the hours of labor of women is to be found in Bulletin No. 118, of the Bureau of Labor Statistics, U. S. Department of Labor, from which the following table is compiled:

EUROPEAN LEGISLATION.

Legislation of other countries.

STATES IN WHICH THE HOURS OF LABOR OF WOMEN ARE LIMITED IN FACTORIES AND WORK-SHOPS TO 10 HOURS PER DAY, AND FROM 58 TO 60 HOURS PER WEEK.

GREAT BRITAIN
Saturdays 7½ hours.

GERMANY
Saturdays 8 hours.

NETHERLANDS
FRANCE
SERVIA
BULGARIA
ROUMANIA

In Switzerland and Austria the general limitation is 11 hours a day and from 64 to 66 hours per week; in Russia the limitation is 11½ hours a day and 67½ hours a week; while in Italy the 12 hour day is permissible.

AMERICAN LEGISLATION.

In the United States the provisions of the laws of the various States were as follows: Legislation of other States.

MASSACHUSETTS, MICHIGAN, OHIO:
10 hours a day; 54 hours a week.

CONNECTICUT, MAINE, MINNESOTA:
10 hours a day; 58 hours a week.

RHODE ISLAND:
10 hours a day; 6 hours Saturday.

NEW HAMPSHIRE:
9 hours and 40 minutes a day; 58 hours a week.

ILLINOIS:
10 hours a day.

WISCONSIN:
10 hours a day; 55 hours a week.

OREGON, VIRGINIA, GEORGIA, PENNSYLVANIA:
60 hours a week; not more than 12 hours in any day.

SOUTH CAROLINA:
60 hours a week; not more than 11 hours in any day.

LOUISIANA, KENTUCKY, NEW YORK, NEBRASKA, MISSISSIPPI:
10 hours a day.

MISSOURI:

9 hours a day; 54 hours a week.

ARIZONA:

8 hours a day; 48 hours a week, but only for women in the laundry department of laundries.

Australasian legislation.

AUSTRALASIA.

QUEENSLAND, VICTORIA:

10 hours a day; 48 hours a week.

NEW SOUTH WALES, SOUTH AUSTRALIA:

48 hours a week.

WESTERN AUSTRALIA:

8 hours and 45 minutes a day; 48 hours a week.

NEW ZEALAND:

8¼ hours a day; 45 hours a week except in woolen factories where 8¾ hours a day and 48 hours a week is authorized. This law applies to both men and women.

For the sake of brevity, we have not specified the particular occupations to which these statutes apply, but it is generally true that the acts were primarily factory acts and applied to labor performed in connection with machinery or where the speed of the worker was set by machinery. In England, however, the Shop Act was in existence. In New Zealand the basis of the legislation was obviously

socialistic, and this is generally true of the laws of Australasia, which were the expression of economic ideas and theories of social justice.

Drastic character of California Act.

The Statute under discussion contains a more drastic limitation of the hours of labor than any law theretofore enacted. The scope of the Act is so broad that it is obvious that the limitation was not imposed for the protection of health; at least if existing legislation may be considered as a standard of comparison. No investigation was conducted in California prior to the passage of the Act, and so far as we are aware no investigation conducted in any part of the world supports the view that the restriction of the labor of women in mercantile establishments, hospitals, or apartment houses, to the period of 8 hours a day or 48 hours a week is called for as a health measure.

In the year 1911 the theories of social justice entertained by a part of the people became the basis of political discussion, and in that year, and the succeeding years, legislation of the class under consideration was enacted, sometimes under the assumed guise of health laws, sometimes without any pretense of such a basis.

The chart printed as an appendix to this brief is an attempted summary of recent legislation on this subject. (See Appendix.)

Viewed in the light of existing legislation there is apparently no general belief or commonly ac-

cepted point of view justifying the assumption that work for more than eight hours a day or forty-eight hours a week is injurious to the health of women. Certainly there are no special or peculiar conditions incident to work of women in mercantile establishments, hospitals or apartment houses justifying such a conclusion.

Statute goes further than proper for protection of health.

In *Low* v. *Rees Printing Company*, 59 N. W., 362, 368, the Supreme Court of Nebraska had under consideration a statute which among other provisions contained the following clause:

> "Section 1. Eight hours shall constitute a legal day's work for all classes of mechanics, servants and laborers through the State of Nebraska, excepting those engaged in farm and domestic labor."

The Court said:

> "A full and careful examination of all the questions presented has satisfied us that sections 1 and 3 of the act discussed are unconstitutional, for the reasons above assigned. The legislation attempted cannot be defended as a police regulation, as was attempted in argument; for, under pretense of the exercise of that power the legislature cannot prohibit harmless acts, which do not concern the health, safety, and welfare of society. *Millett* v. *People, supra; Frorer* v. *People, supra; State* v. *Loomis, supra; Ex parte Kuback*, 85 Cal., 274, 24 Pac., 737; *In re Jacobs, supra; People* v. *Gillson, supra.* The claim that this act was a proper exercise by the legislature of its police power cannot be sustained. It results that the judgment of the district court is affirmed."

Ritchie v. People.

In *Ritchie* v. *People*, 155 Ill., 98, the Supreme Court of Illinois declared invalid a statute

limiting the hours of labor of women in certain occupations to eight hours a day, the Court saying: Ritchie v. People.

> "There is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."

If a law limiting the hours of labor of women in pursuits such as those included in the classification embraced in this Statute is reasonably necessary for the protection of health, then a law limiting to the same extent the hours of labor of women engaged in any occupation is equally necessary. If this be the case, every court, with the exception of the Supreme Court of California, has been in error when passing on the question, and every State but California derelict in its duty.

The conclusion that the purpose of the Act is not the preservation of public health is supported not only by a consideration of the field covered by the Act, but also by a consideration of the exceptions embodied in the Statute, as well as the limitation of the classification on which the Act rests. Exceptions to Act negative claim that is a health law.

Employees of persons engaged in the practice of professions and arts are not included in the Act unless the term "mercantile establishments" be interpreted in the liberal sense, but conceding that no deduction fatal to the Statute should be drawn from an hypothesis which rests on interpretation, still it is

Exceptions to Act negative claim that it is a health law (Continued).

clear that the Act does not apply to domestic service or agricultural labor. Obviously this is due to considerations of public convenience coupled with political power. It cannot be contended that the strain of agricultural labor is less burdensome upon a woman than that of labor in mercantile establishments, or that experience has shown that the health of women engaged in this pursuit is better preserved than that of women engaged in mercantile establishments.

Domestic service is one of the principal occupations in which labor is performed by women. From such statistics as exist this field of labor appears to be more injurious to the health of the worker than the great majority of occupations or places to which the Act applies. Certainly the percentage of insanity is higher in the fields to which the Act does not apply, than those regulated by it.

Absence of an Emergency Clause.

In addition to all other considerations the fact that the Statute contains no emergency clause shows that the preservation of health was not the object of the law. No detriment to health could reasonably be anticipated if more than eight hours were permitted in order to meet the emergencies of life. It is, however, well known that those advocating the enactment of labor laws on economic grounds have firmly opposed the introduction into such statutes of any element of elasticity.

In concluding this branch of the discussion we submit that the Act cannot be viewed as a health measure, but must be regarded as a strict and unyielding law designed to advance the economic welfare of certain of the women engaged in labor in the places specified in the Statute, or employed by companies of the class therein mentioned.

True object of the Act

LAWS LIMITING THE PERIOD OF TIMF FOR WHICH ADULTS MAY WORK AT A LAWFUL CALLING OPERATE TO DEPRIVE THOSE SUBJECT THERETO OF LIBERTY.

The right to pursue an ordinary calling is an essential part of the right of liberty protected by the Fourteenth Amendment.

Allgeyer v. *Louisiana,* 165 U. S. 578.

Smith v. Texas.

As said by this Court in *Smith* v. *Texas,* 233 U. S., 636:

> "Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

Lochner v. N. Y. Prevailing opinion.

In *Lochner* v. *New York,* 198 U. S., 45, the rules of law relating to this subject were clearly set forth. That case involved the validity of a law limiting the hours of labor of bakers to ten hours a day. The Court said:

> "It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and

in his power to contract in relation to his own labor" (p. 58).

Lochner v. N. Y. Prevailing opinion. (Continued.)

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation" (pp. 56, 57).

The case was decided by a divided court, but the portion of the opinion quoted above met with the approval of all the justices with the exception of Mr. Justice Holmes. The majority of the court

reached the conclusion that the trade of a baker was not an unhealthy trade, this conclusion being a pure conclusion of fact. As a result the Court declared the law invalid, saying:

> "It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution" (p. 64).

Lochner v. N. Y. Dissenting opinion.

In this opinion Justices Harlan, White and Day did not concur; they differed from the conclusion of the Court not so much on questions of law as on matters of fact. The decision was predicated on the fact that the trade of a baker was not an unhealthy trade, and that a law limiting the period of labor of those engaged therein to ten hours a day was not in fact necessary for the protection of the health of the worker. The dissenting opinion of Mr. Justice Harlan, joined in by Mr. Justice White and Mr. Justice Day, takes issue with the decision of the Court on these questions of fact.

In the opinion of Mr. Justice Harlan it is said:

"In *Jacobson* v. *Massachusetts, supra,* we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* 'when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law'—citing *Mugler* v. *Kansas,* 123 U. S., 623, 661; *Minnesota* v. *Barber,* 136 U. S., 313, 320; *Atkin* v. *Kansas,* 191 U. S., 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCullock v. Maryland,* 4 Wheat., 316, 421."

"It is plain that this statute was enacted in order to protect the physical wellbeing of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employes in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the Court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or

Lochner v. N. Y. Dissenting opinion. (Continued).

> substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler* v. *Kansas, supra.* Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, *Patterson* v. *Kentucky, supra;* or that it is not promotive of the health of the employes in question."

Lochner v. *New York, supra,* 68, 69.

In other words there was no particular difference in point of law between the members of the court concurring in the opinion of Mr. Justice Peckham, or those concurring in the opinion of Mr. Justice Harlan.

The differences in opinion merely emphasize the fact that in passing on the validity of a law respecting rights guaranteed by the Fourteenth Amendment, three questions are always presented:

(1) Does the law invade the liberty of the individual guaranteed by the Constitution?

(2) Is the object which the legislature designed to accomplish by the law such that the rights protected by the Fourteenth Amendment may be modified by legislative act in order to achieve the desired result?

(3) Conceding that the object of the statute is such that constitutional rights may be restricted by

direct legislative action in order to effectuate it, is the restriction imposed reasonable or arbitrary and unnecessarily oppressive?

In *Muller* v. *Oregon*, 208 U. S., 412, this Court upheld the Oregon Act of 1903, which prohibited the employment of women in mechanical establishments, factories or laundries more than ten hours a day. The opinion proceeds on the assumption that such a restriction could not be upheld if applicable to men, but points out that the fundamental physical differences between men and women, coupled with the general consensus of opinion to the effect that a ten-hour law may be reasonably considered as a proper limitation for the protection of the health of women laboring in certain occupations, render the provision prohibiting labor in laundries valid as a health law, the Court saying: Muller v. Oregon.

> "For these reasons, and without questioning in any respect the decision in *Lochner* v. *New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry."
>
> *Muller* v. *Oregon*, 208 U. S., 423.

These decisions clearly establish that the right to labor is a constitutional right and that this right can only be abridged by legislative action when that action of itself constitutes due process of law.

The Lochner case lays down the rule that at least so far as grown men are concerned, legislation limit-

ing the hours of labor can only be sustained when the act falls within the well defined classes of police power, such as the protection of health.

Women are not wards of the State.

We do not understand that the Muller case lays down any different rule so far as grown women are concerned. That case merely declares that owing to structural differences legislation restricting the hours of labor of women may be sustained as a health regulation; that is, its object may be the protection of health, though the same limitation could not be applied to men. It seems clear there was no intention to declare that women were wards of the State and therefore not entitled to the same protection which the Constitution afforded to men. On the contrary, the Court was careful to point out that the same constitutional rule applied, but that the decision rested on difference in fact arising from difference in physical structures.

Ritchie v. People.

In the case of *Ritchie* v. *People,* 155 Ill., 98, an eight-hour law for women was declared invalid, the Court saying:

> "The first section of the Fourteenth Amendment to the constitution of the United States provides: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' It has been held that a woman is both a 'citizen' and a 'person' within the meaning of this section. *Minor* v. *Happersett,* 21 Wall., 162. The privileges and immunities here referred to are, in general, 'protection by the government, with the right to acquire and possess prop-

erty of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.' *Slaughterhouse Cases,* 16 Wall., 36. As a 'citizen,' woman has the right to acquire and possess property of every kind. As a 'person,' she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty, or property without due process of law. Involved in these rights thus guaranteed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations."

The decision of the Supreme Court of California in the Miller case did not question the position here assumed, but was based on the hypothesis that the law under consideration was a health law. Indeed, the political equality of men and women is secured by the Constitution of the State of California, and it did not occur to the courts to suggest that woman in California was inferior to the male in legal or political right.

In referring to the status of women, the New York Court of Appeals said: People v. Williams.

"The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly transcending the powers conferred by the Constitution upon the legislative body.

"In this section of the Labor Law it will be observed that women are classed with minors under the age of eighteen years; for which there is no reason. The right of the State, as *parens patriae,* to restrict, or to regulate, the labor and employment of children is unquestionable;

but an adult female is not to be regarded as a ward of of the State, or in any other light than the man is regarded, when the question relates to the business pursuit or calling. She is no more a ward of the State than is the man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases and as long as she pleases, within the general limits operative on all persons alike."

"So I think, in this case, that we should say, as an adult female is in no sense a ward of the State, that she is not to be made the special object of the exercise of the paternal power of the State, and that the restriction, here imposed upon her privilege to labor, violates the constitutional guarantees. In the gradual course of legislation upon the rights of women, in this State, she has come to possess all of the responsibilities of the man and she is entitled to be placed upon an equality of rights with the man."

People v. *Williams*, 189 N. Y. Rep., 135, 137.

The decisions of this Court and the weight of authority in the State courts sanction the view that laws restricting the hours of labor, either of adult men or women, do operate to deprive those to whom they apply of liberty.

Lochner v. N. Y. Opinion of Mr. Justice Holmes.

There is, however, a different view which was expressed by Mr. Justice Holmes in a dissenting opinion in the *Lochner* v. *New York* case. In that opinion it was said:

"I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man

might think it a proper measure on the score of health. Men whom I certainly would not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."

Lochner v. N. Y. Opinion of Mr. Justice Holmes. (Continued.)

Lochner v. *New York*, 198 U. S., 76.

The view here expressed by Mr. Justice Holmes concerns exclusively the interpretation of the phrase "deprived of liberty." The opinion concedes that the constitutional guaranty does to some extent check the natural outcome of dominant opinion, but lays down a rule of constitutional construction more hostile than that usually applied to a policy of insurance. It is undoubtedly true that in construing this provision of the Constitution, the Court must consider the reserved power of government, which is no more than the right of the majority to enact laws, but as the very object of the amendment was to limit this right, the Court should not adopt a rule of construction which can be justified only on the theory that the effect of the amendment was purely accidental and should be restrained as far as possible by construction. Indeed, the rule of interpretation suggested by Mr. Justice Holmes is so strict that it would if adopted place the legislative body in control of the interpretation of the Constitution. The mere passage of a law necessarily carries with it a declaration that the members of the legislature did not interpret the Constitution as prohibiting its

Discussion of opinion of Mr. Justice Holmes.

Discussion of opinion of Mr. Justice Holmes. (Continued.)

enactment or execution. The Court must necessarily assume that the members of the legislature are fair men. They are sworn to uphold the Constitution. So the mere enactment of a law is conclusive evidence that some fair men acting under oath to uphold the Constitution do not admit that the law passed violates fundamental principles as they have been understood by the traditions of our people and our laws.

Meaning of the term liberty.

The term liberty should be fairly construed as including things which were considered as embraced therein at the time the Fourteenth Amendment was adopted. The sum of what a word of this character implies and means doubtless differs with people of different traditions living under different forms of government. In a social democracy the word may means no more than equality before the law; to those living under a despotic form of government freedom from arrest may be the only idea conveyed, but in a republic or to those living under a republican form of government the word means more. As said by this Court in *Smith* v. *Texas,* 233 U. S., 630:

> "Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In *Lochner* v. *New York,* 198 U. S., 45, this Court held that a law limiting the hours for which a man might work operated to deprive him of

liberty and the same principle has been announced in the following cases: Meaning of the term liberty. (Continued)

Allgeyer v. *Louisiana,* 165 U. S., 578;

Addyston Co. v. *U. S.,* 175 U. S., 211;

Ex Parte Drayton, 153 Fed., 989;

In re Sing Tuck, 126 Fed., 388;

State Ex. Rel. Galle. v. *New Orleans,* 113 La., 371.

Inasmuch as the statute under consideration operates to deprive appellants of liberty its validity depends upon the question of whether or not this has been done without affording to the appellants due process of law.

THE STATUTE OPERATES TO DEPRIVE APPELLANTS OF LIBERTY WITHOUT DUE PROCESS OF LAW.

It is of course well settled that in certain cases legislative action alone or coupled with administrative action constitutes due process of law. Many cases illustrate the fact that persons may be deprived of liberty or property by legislative action.

Lawton v. Steele.

As said by this Court in *Lawton* v. *Steele*, 152 U. S., 133, 136:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S., 27; *Kidd* v. *Pearson*, 128 U. S., 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those

> of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

There is no doubt that the legislation in question would be valid if the law were enacted as a health measure and the restrictions imposed were no more than reasonable to accomplish that object. But we have we believe shown beyond question that the object of the law is not the protection of public health. The object of the law is at best the amelioration of the condition of certain working classes. To this end the people in general are deprived of liberty.

In *Lochner* v. *New York,* 198 U. S., 45, this Court declared that such legislative action did operate to deprive those affected thereby of liberty without due process of law, the Court deciding that such legislation could be viewed as affording due process of law only when the object of the legislation was the protection of the public health. Lochner v. N. Y.

In *Muller* v. *Oregon,* 208 U. S., 412, the same rule was laid down and the statute supported as a health law. Muller v. Oregon.

In the Miller case the Supreme Court of California obviously entertained the view that the law must be sustained if at all as a health law. No court in this country has declared that such laws could be sustained on any other basis.

This Court has repeatedly refused to attempt to

Police power.

define the limits of police power, but as said in the Mugler case, the Fourteenth Amendment was not intended to abridge the right of the State to legislate for the protection of the health or morals of the people. It cannot, however, be pretended that the liberty of the individual which is protected by the Constitution can be invaded by laws passed for the general good.

The term police power has been used to describe legislative power and in this sense it includes power to pass any law which does not invade rights guaranteed by the Constitution, but the term has also been used in a narrower sense as referring to laws which do invade constitutional rights but are enacted in furtherance of certain limited objects to the attainment of which constitutional guarantees give way or for the achievement of which legislative action alone suffices.

Without attempting a definition of police power in the sense necessary to support an act of this character it is obvious that legislation which can be supported only by reference to it, must have some basis in the commonly accepted moral ideas of the people. For instance if the commonly accepted ideas of right and wrong as the same exist in America were similar today to those existing in Turkey a law might well be sustained forbidding women to appear unveiled. If, however, such a law were enacted in America on the theory that the economic

stimulus resulting in the manufacture of veils was desirable, the statute would be invalid. The moral sentiment of the country on the subject of a living wage is such that a law prohibiting the employment of men or women at a sum honestly fixed as a living wage might be sustained, but a law providing that no hod carrier should be paid less than five dollars for a day's work would be declared invalid without hesitation, though such wages are today current in the City of San Francisco.[1] Police power.

The fact that the economic theories in vogue with certain sections of the people may countenance or even demand modification in rights of property or liberty even if these people be so numerous as to compose a majority in one or more States, is not sufficient to remove legislation enacted in furtherance of these views from the restraints imposed by the Fourteenth Amendment.

The accepted morality of this country is such that laws limiting the hours of labor should be and are sustained if the limitation imposed is reasonably necessary for the protection of the health of the worker or of the public. But laws limiting the hours of labor for the purpose of establishing the economic ideas of a class at the expense of the

[1] It may be worthy of note that a constitutional amendment providing for legislative action fixing a minimum wage was recently proposed and passed in California under the provisions of the Constitution authorizing the use of the initiative for that purpose. At the same time a universal eight-hour law failed to pass. During the course of the campaign a six-hour law was seriously advocated by one of the candidates for the United States Senate.

liberty of the individual, run counter to the accepted morality of today.

In conclusion on this branch of the argument, we beg to call to the attention of the Court the following extract from the opinion in *Mugler* v. *Kansas*, 123 U. S., 623, 661:

> "'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Conclusion.

The mere exercise of the right to live and to work cannot be made a crime under our constitution as it now exists. Legislation declaring criminal the legitimate exercise of liberty guaranteed by the Constitution does not constitute due process of law. The Constitution itself must be amended before such legislation can be enforced.

Muller v. *Oregon*, 208 U. S., 412.

THE STATUTE IS INVALID EVEN IF INTENDED AS AN EXERCISE OF POLICE POWER, THE RESTRICTIONS OF LIBERTY THEREIN CONTAINED BEING ARBITRARY AND UNNECESSARILY OPPRESSIVE.

The preceding argument rests largely upon the fact that the statute restricts the hours of labor of women to eight hours a day and forty-eight hours a week and the fact that such a drastic limitation of the hours of labor is not necessary to preserve the health of women in many if not all the occupations mentioned in the statute. From these premises and other incidental facts the conclusion is drawn that the statute is not to be viewed as an exercise of police power designed to protect public health. If, however, it be assumed that this conclusion does not necessarily flow from the premises, and if the assumption that the act may in its entirety be viewed as a health law be adopted, the act is nevertheless unconstitutional.

Conceding the object with which this statute was enacted to be the protection of health or some other object in furtherance of which the right of liberty guaranteed by the Constitution may be curtailed, it is, of course, well settled that limitation imposed in the exercise of the police power on constitutional rights must be reasonable, not arbitrary or unnecessarily oppressive.

Smith v. *Texas,* 233 U. S., 630, 636;

Smith v. *Alabama,* 124 U. S., 465, 480;

Lawton v. *Steele,* 152 U. S., 133, 137;

Lochner v. *New York,* 198 U. S., 56.

As said in *Smith* v. *Texas,* 233 U. S., 630, 636:

> " . . . as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' *Lawton* v. *Steele,* 152 U. S., 133, 137."

As said in *Lochner* v. *New York,* 198 U. S., 45, 56:

> "In every case that comes before this Court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

And as pointed out in *Muller* v. *Oregon,* 208 U. S., 412, this question is always a question of fact to be decided in the light of our existing knowledge. The question, therefore, is this: Assuming that the purpose of the statute is the preservation of the health of women or of the public, is the restriction imposed with the object of accomplishing this end reasonable, or unnecessary and arbitrarily oppressive? The restrictions imposed are:

1. Prohibition of the performance of more than eight hours work in any one day.

2. Prohibition of the performance of more than forty-eight hours work in any one week.

The statute makes no provision for the emergencies of life, the limit prescribed being in all cases absolute and unyielding.

The question of fact on which this branch of the case depends must be answered in view of our knowledge as the same exists today. As said in *Muller* v. *Oregon*, 208 U. S., 412:

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Muller v. *Oregon, supra*, 420, 421.

Attention has already been called to the fact that no country in the civilized world imposes such oppressive and drastic limitations upon liberty of women, and this is strong evidence that common experience has shown such are unnecessary. We do not, however, desire to repeat facts stated in the prior pages of this brief, though in a somewhat different connection, but will merely refer thereto. However, we respectfully submit that the limita-

tions contained in the statute are obviously arbitrary and unnecessarily oppressive, and this is particularly true of women working in hospitals. The absence of an emergency clause indeed operates most oppressively in such cases. See *Lochner* v. *New York*, 198 U. S., 45. But apart from this, as said by the Supreme Court of Massachusetts:

> "There is nothing in ordinary labor, by men of full age, for more than eight hours a day, that calls for prohibition in the interest of the public health, the public safety, the public morals, or the public welfare. It is obvious that many of the most successful men could not have attained the prosperity which they have enjoyed if prohibited from working for themselves or contracting to work for others more than a small part of the hours of each day."
>
> *Opinion of Justices*, 208 Mass., 622.

We submit that this remark is true of women as well as men. Indeed, it has been so decided in *Ritchie* v. *People*, 155 Ill., 98. The Court said:

> "There is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel —for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."

In conclusion, we respectfully submit that the law under consideration must be declared invalid or the

Constitutional provisions subordinated to the power of the legislature.

It is one thing to uphold a law enacted for the purpose of protecting the health of men or women from sacrifice to the greed of capital. It is a very different thing to uphold a law limiting the freedom of the individual enacted not for the protection of the health of the class to which that individual belongs but designed to sacrifice the ambitious in order that the less industrious members of the class may work shorter hours. The law under consideration is, we believe, the first statute which has come before any court applying to organizations primarily charitable such as hospitals. It is the first attempt by legislation to curtail the hours of labor of students and members of professional classes. It is the first attempt to increase the remuneration of the working class at the expense of the very poor. It is strange, but the act is so framed that the poor are those primarily affected by it for the statute operates to increase to a very marked degree the cost of maintaining hospitals and the primary beneficiaries of hospitals are the poor. If the question of general welfare were one on which a court could override the decision of the legislature there would be little difficulty in showing that the effect of the statute was not to promote the general welfare, at

least so far as hospitals and those employed therein are concerned.

Respectfully submitted.

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